IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

FRIDAY, THE 12TH JANUARY 2007 / 22ND PAUSHA 1928

CRL.A.No. 1700 of 2006(C)

SC.541/2005 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE FAST TRACK COURT NO.II, PALAKKAD

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APPELLANT: ACCUSED

KRISHNAN S/O.APPU, C.NO.3761,
CENTRAL PRISON, KANNUR.

BY ADV. SRI.LATHEESH SEBASTIAN(S.B)

RESPONDENTS: COMPLAINANT

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1. THE STATE OF KERALA,
REP.BY EXCISE INSPECTOR, EXCISE RANGE OFFICE,
CHITTUR, PALAKKAD.

2. THE STATE OF KERALA,
REP.BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

BY PUBLIC PROSECUTOR SRI.C.M.NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. Thankappan, J.

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Crl.A. No. 1700 of 2006

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Dated this the 12th January,2007

JUDGMENT

The appellant was charge-sheeted for the offence punishable under section 55(a) of the Abkari Act on the allegation that he was found in possession of six bottles of 375 ml capacity containing coloured arrack in violation of the provisions of the Abkari Act. To prove the charge against the appellant, the prosecution examined PW1 to PW5 and Exts.P1 to P8 were marked. MOI to MO3 were also marked. When the appellant was questioned under section 313 of the Cr. P.C., he denied the allegation. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(a) read with section 8(2) of the the Abkari Act and he was convicted thereunder and sentenced to undergo simple imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default to undergo simple imprisonment for a period of four months. The judgment of the trial court is under challenge in this appeal.

2. Since the appeal is filed through the jail authorities, a member of State Brief Panel has been appointed by this Court.

3. Heard.

4. The learned counsel for the appellant has taken three contentions before this Court. Firstly, the learned counsel contends that the trial court went wrong in relying on the evidence of PW1 and PW2 official witnesses to find the appellant guilty of the offence. Secondly, it is contended that the trial court committed an error in finding the appellant guilty under section 55(a) read with section 8(2) of the Abkari Act. To substantiate the above contention the learned counsel relies on three decisions of this Court reported in Purushan V. State of Kerala (2002(2) KLT 661, Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631). Thirdly, the learned counsel contends that the sentence awarded against the appellant is excessive.

5. The prosecution tried to prove its case through the evidence of PW1 and PW2. PW1 who is the Excise Inspector had stated that on 17-1-2001 at 5.30 P.M. while he was conducting patrol duty and when they reached the Panchayat road in front of Yakooob Master's house at Odukurinji, they saw the appellant holding MO3 bag and on examination it is revealed that MO3 bag contained six bottles each containing 375 ml. coloured arrack. He also stated on preparing Ext.P2 seizure mahazar, the contraband articles were seized and out of six bottles, one bottle was taken

as sample. He further stated that the appellant was arrested and later the appellant and the contraband article were produced before the court on the next day. PW2 is the Preventive Officer who accompanied PW1 on patrol duty on the date of the incident. He had given evidence in corroboration with the evidence of PW1. This witness stated that the appellant was found in possession of MO3 bag which contained MO1 series of bottles and MO2 glass and the sample was taken by PW1. PW4 is the Excise Inspector who had given evidence before the court that the further investigation of the case had been conducted by him and he had questioned some of the witnesses and got analyzed the sample taken by PW1 and produced Ext.P8 chemical analysis report. As per Ext.P8 chemical analysis report, the sample was spirit and it contained 74.25% by volume ethyle alcohol. PW3 and PW5 are independent witnesses who signed Ext.P2 mahazar. Even though they were examined to support the prosecution case, they turned hostile to the prosecution. However, they admitted their signatures in Ext.P2 mahazar. After considering the evidence, the trial court found that the prosecution had clearly established its case beyond reasonable doubt and hence the appellant had committed an offence punishable under section 55(a) read with section 8(2) of the Abkari Act. The contention of the learned counsel for the appellant that no independent witnesses have examined to prove the

case against the appellant cannot be sustained, as the prosecution has already cited two independent witnesses, but they turned hostile to the prosecution. The prosecution did its duty by citing the above witnesses and examining them. Hence, this Court is of the view that the trial court is fully justified in relying on the evidence of PW1 to PW4 to find that the appellant was found in possession of MO3 bag and MO1 series of bottles and it requires no interference by this Court.

6. With regard to the second contention that as per the decisions, it is the duty of the prosecution to prove that the possession of liquor or any intoxicating drug in question was in the course of import, export, transport or transit. In this context, in Purushan's case (Supra) this Court categorically held that the possession therein was not directly involved in the process of import, export or transport. The same view was expressed in Surendran's case (Supra). In the above decision this Court held that when a person was in possession of illicit liquor while illegally importing it, the case would be covered under section 55(a) of the Abkari Act. It is also held that in a case where the possession was of illicit liquor, the case would fall within section 58 of the Abkari Act. In the case in hand, the prosecution case is that the was found in possession of six bottles of 375 ml capacity containing coloured arrack in violation of the provisions of the Abkari Act.

Hence, on the principles laid down in the above decisions, this Court is of the view that the finding of the trial court that the appellant committed an offence under section 55(a) of the Abkari Act is not sustainable in law and the appellant is liable to be punished for an offence under section 58 of the Abkari Act. It has come out in evidence that the sample was identified as spirit. Hence, the finding of the trial court that the appellant had committed an offence punishable under section 8(2) of the Abkari Act is also not sustainable. Hence, the conviction entered by the trial court against the appellant under section 55(a) read with section 8(1) of the Abkari Act are hereby set aside. Accordingly, the appellant is found guilty under section 58 of the Abkari Act and he is convicted thereunder.

7. With regard to the sentence, the trial court had considered the pleadings of the appellant for mercy of the court on the ground that the he was aged 75 and having rheumatism and eye problems and imposed sentence of one year simple imprisonment with fine of rupees one lakh with default sentence. Considering the fact that the appellant was aged 76 years and he, being a first offender, the sentence of six months' rigorous imprisonment and fine of Rs.1,00,000/- and default sentence of three months' simple imprisonment will meet the ends of justice.

8. In the result, the appellant is sentenced to undergo rigorous

imprisonment for six months and to pay fine of Rs.1,00,000/- and in default to undergo simple imprisonment for three months. The appellant is entitled to the benefit under section 428 Cr.P.C.

The appeal is allowed in part.

K.Thankappan,
Judge.

mn.

K. Thankappan,J.

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Judgment

12-1-2007